

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

AUG 21 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0089-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
EARNEST LEE BROWN,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051556

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney  
By Kellie Johnson

Tucson  
Attorneys for Respondent

Earnest Lee Brown

Hinton, OK  
In Propria Persona

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B R A M M E R, Judge.

¶1 After a bench trial, petitioner Earnest Brown was convicted of manufacture of a dangerous drug and possession of drug paraphernalia. The trial court sentenced him to

concurrent, mitigated prison terms, the longer of which was 4.5 years. We affirmed Brown's convictions and sentences on appeal. *State v. Brown*, No. 2 CA-CR 2007-0223 (memorandum decision filed Feb. 15, 2008).

¶2 Counsel subsequently filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Relying on *State v. Smith*, 184 Ariz. 456, 910 P.2d 1 (1996), and *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614, *supp. op.*, 182 Ariz. 118, 893 P.2d 1281 (1995), counsel claimed he had reviewed the record and could not "find any viable issues to present" in a post-conviction petition and asked that Brown be given the opportunity to file a pro se petition. We note at the outset that, in 2000, the Supreme Court of Arizona amended Rule 32.4(c) in accordance with *Smith* and *Sheldon* to clarify that an *Anders*<sup>1</sup>-type proceeding applies strictly to Rule 32 of-right proceedings as defined in Rule 32.1. 198 Ariz. CXV (2000). Although this was not an of-right proceeding, the trial court nonetheless granted counsel's request that Brown be permitted to file a pro se petition. In his pro se petition, Brown challenged the search of his home as unlawful. This petition for review followed the court's summary dismissal of that petition. Because the court permitted Brown to file the pro se petition, we review the propriety of the court's denial of relief. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

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<sup>1</sup>*Anders v. California*, 386 U.S. 738 (1967).

¶3 To the extent we understand the issues raised in Brown’s pro se petition for review and the supplement to that petition, he appears to be presenting entirely different claims than he had presented in his Rule 32 petition below. This court will not consider for the first time on review issues that have neither been presented to, nor ruled on by, the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). Moreover, to the extent Brown may be intending to challenge on review the trial court’s denial of relief on his claim that the search of his home had been unlawful, that claim is plainly precluded under Rule 32.2(a)(1) and (3). As the trial court correctly found, Brown’s “claim that the search of his home violated his constitutional rights is an issue that could—and should—have been raised on appeal. Because [Brown] failed to raise this argument on appeal, he is precluded from raising it now.” Brown’s claim does not fall within any of the exceptions to the rule of preclusion. *See* Ariz. R. Crim. P. 32.2(b).

¶4 Because the trial court did not abuse its discretion by dismissing Brown’s petition for post-conviction relief, we grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge